A

Suruhanjaya Sekuriti v Datuk Ishak bin Ismail

B FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02-21-04 OF 2012(W)
RAUS SHARIF PCA, ABDULL HAMID EMBONG, AHMAD MAAROP, HASAN LAH AND ABU SAMAH NORDIN FCJJ
19 JANUARY 2016

C

Evidence — Privilege — Confidential statements to public officer — Investigating officers of Securities Commission ('SC') probing suspected offences under securities laws interviewed and recorded statements from several persons in official confidence — Whether upon application for discovery by party sued by SC D *for breach of securities laws SC could refuse disclosure of statements on ground of privilege — Whether communications made to public officer in official confidence privileged under s 124 of the Evidence Act 1950 — Whether public officer could not be compelled to disclose such communications if he considered public interest would suffer by disclosure — Whether fact s 134(4) of the Securities Commission* E *Act 1993 provided that any statement made and recorded under that section was admissible as evidence in court meant disclosure of such statement could be ordered — Whether s 134(4) had to be read subject to rules of privilege and prohibition on grounds of public policy*

F Investigating officers of the appellant interviewed and recorded statements from 38 persons ('the s 134 statements') under s 134 of the Securities Commission Act 1993 ('the Act') while investigating suspected offences committed by the respondent under the securities laws. When the appellant filed an action against the respondent in the High Court seeking declarations G that he had breached various provisions of the Capital Markets and Services Act 2007 ('the CMSA') and an order that he pay the appellant RM18.9m under the CMSA in respect of profits unlawfully made, the respondent applied for discovery of various documents in the appellant's possession including the s 134 statements. The High Court ordered disclosure of all documents applied H for by the respondent. The Court of Appeal ('COA') affirmed the High Court's decision but ruled that the appellant's investigation papers should be excluded from disclosure. The COA held, inter alia, that as s 134(4) of the Act clearly stated that any statement made and recorded under that section was admissible as evidence in court the High Court did not err in ordering discovery of the I statements. The instant appeal was only against the decisions of the courts below in ordering the disclosure of the s 134 statements. The appellant argued, inter alia, that the respondent was not entitled to have access to the s 134 statements because that could jeopardise any subsequent criminal proceedings the appellant might decide to institute against the respondent. The respondent,

on the other hand, argued, inter alia, that s 134 of the Act did not state that the s 134 statements were privileged or confidential and could not be disclosed. He contended that disclosure was necessary for the trial court to know the basis of the appellant's claim and to facilitate a fair disposal of the case.

Held, allowing the appeal and setting aside the decisions of the courts below in ordering the disclosure of the s 134 statements:

(1) Essentially, the Court of Appeal allowed the disclosure of the s 134 statements because it held that s 134(4) of the Act was clear that statements made under s 134 were admissible in evidence. That was in the case especially in view of a claim of privilege from disclosure of the s 134 statements. Evidence was admissible and should be received by the court unless there was a legal reason for its exclusion. Evidence of relevant facts became inadmissible when its reception an over-simplification of the crucial issue offended public policy (or public interest) or a particular rule of law, an example of which was evidence of matters which were privileged against disclosure. Section 134(4) of the Act had to be read subject to the rules of privilege and prohibition on the grounds of public policy. This applied to civil as well as criminal proceedings (see paras 31–32).

(2) The appellant's case for non-disclosure of the s 134 statements was based on the privilege provided under s 124 of the Evidence Act 1950. Under that section, communications made to a public officer in official confidence were privileged. Any communication which was treated as confidential and made to a public officer under an honest and bona fide belief that he would keep the contents of, or the information contained in, such communication confidential without disclosing the same to others would come within the ambit of s 124. Section 124 included not only communications made in official confidence by one public officer to another, but also communications made in official confidence by a private person to a public officer (see paras 36 & 39).

(3) The court had to first determine whether the communication in question was made to a public officer in official confidence. If the answer was in the negative, then the s 134 statements would have to be disclosed. If the answer was in the affirmative, then it was for the officer concerned to decide whether the statements should be disclosed or not. According to the affidavit filed by Mohd Rizal bin Mohamad @ Harun, an investigation officer of the appellant, in opposing the respondent's application for discovery, the 38 persons who were interviewed by the appellant came in and provided the information which was recorded in their statements on the basis the statements were confidential. On the affidavit given, it was clear the s 134 statements were communications made by each of the 38 persons to the investigation officers of the

appellant in the course of the latter's official duties as public officers under the Act and that the communications were made in official confidence. Mohd Rizal deposed that if the s 134 statements were ordered to be disclosed, future witnesses would not give their information to the appellant with the assurance that their statements would be confidential. This, according to him, would greatly prejudice the appellant's ability to carry out its future investigations into offences under the securities laws. In other words, public interest would suffer by the disclosure of the s 134 statements. As the communications were made in official confidence, it was for the officer to determine whether public interest would suffer by the disclosure of the s 134 statements. He had determined that it would. This court would not interfere. Thus, the Court of Appeal had erred in ordering the disclosure of the s 134 statements pursuant to the respondent's application in encl 38 (see para 48).

[Bahasa Malaysia summary

Pegawai-pegawai penyiasat perayu telah menemu duga dan merekodkan kenyataan-kenyataan daripada 38 orang ('kenyataan s 134') di bawah s 134 Akta Suruhanjaya Sekuriti 1993 ('Akta') manakala kesalahan-kesalahan menyiasat yang disyaki telah dilakukan oleh responden di bawah undang-undang sekuriti. Apabila perayu telah menfailkan tindakan terhadap responden di Mahkamah Tinggi memohon deklarasi bahawa dia telah melanggar pelbagai peruntukan Akta Pasaran Modal dan Perkhidmatan 2007 ('APMP') dan perintah agar dia membayar perayu RM18.9j di bawah APMP berkaitan keuntungan yang telah dibuat secara tidak sah, responden memohon untuk penzahiran pelbagai dokumen dalam milikan perayu termasuklah kenyataan s 134. Mahkamah Tinggi telah memerintahkan penzahiran semua dokumen yang dipohon oleh responden. Mahkamah Rayuan ('MR') telah mengesahkan keputusan Mahkamah Tinggi tetapi memutuskan bahawa kertas siasatan perayu patut dikecualikan daripada penzahiran itu. MR memutuskan, antara lain, yang oleh kerana s 134(4) Akta jelas menyatakan bahawa apa-apa kenyataan yang dibuat dan direkodkan di bawah seksyen tersebut boleh diterima sebagai keterangan di mahkamah Mahkamah Tinggi tidak terkhilaf dalam memerintahkan penzahiran kenyataan-kenyataan tersebut. Rayuan ini adalah hanya terhadap keputusan-keputusan mahkamah bawahan dalam memerintahkan penzahiran kenyataan s 134. Perayu berhujah, antara lain, bahawa responden tidak layak mendapat akses kepada kenyataan s 134 itu kerana ia akan menjejaskan apa-apa prosiding jenayah seterusnya yang mungkin ingin dimulakan oleh perayu terhadap responden. Responden, sebaliknya, berhujah, antara lain, bahawa s 134 Akta tidak menyatakan bahawa kenyataan s 134 adalah dilindungi atau rahsia dan tidak boleh dizahirkan. Dia menegaskan bahawa penzahiran itu perlu untuk mengetahui asas tentang tuntutan perayu dan untuk memudahkan penyelesaian adil kes itu.

Diputuskan, membenarkan rayuan dan mengetepikan keputusan-keputusan

mahkamah bawahan dengan memerintahkan penzahiran kenyataan s 134:

(1) Pada dasarnya, Mahkamah Rayuan telah membenarkan penzahiran kenyataan s 134 kerana ia memutuskan yang s 134(4) Akta adalah jelas bahawa kenyataan yang dibuat di bawah s 134 boleh diterima sebagai keterangan. Ia merupakan kes terutamanya berkenaan tuntutan hak istimewa daripada penzahiran kenyataan s 134. Keterangan boleh diterima dan patut diterima oleh mahkamah kecuali jika terdapat sebab sah untuk pengecualiannya. Keterangan fakta relevan menjadi tidak boleh diterima apabila penerimaannya terhadap isu penting yang melampaui batas yang menjejaskan polisi awam (atau kepentingan awam) atau rukun undang-undang tertentu, suatu contoh yang mana keterangan perkara-perkara yang dilindungi daripada penzahiran. Seksyen s 134(4) Akta perlu dibaca tertakluk kepada peraturan keistimewaan dan larangan atas alasan polisi awam. Ini terpakai kepada prosiding sivil dan juga jenayah (lihat perenggan 31–32).

(2) Kes perayu untuk tidak dizahirkan kenyataan s 134 adalah berdasarkan hak istimewa di bawah s 124 Akta Keterangan 1950. Di bawah seksyen tersebut, komunikasi yang dibuat kepada pegawai awam dengan keyakinan rasmi adalah dilindungi. Apa-apa komunikasi yang dianggap sebagai rahsia dan dibuat kepada pegawai awam di bawah kepercayaan yang jujur dan suci hati yang dia akan menyimpan kandungannya, atau maklumat yang terkandung di dalamnya, komuniksi sedemikian adalah rahsia tanpa menzahirkan yang sama kepada yang lain akan terangkum dalam skop s 124. Seksyen 124 termasuk bukan sahaja komunikasi yagn dibuat dengan keyakinan rasmi oleh pegawai awam kepada seorang lagi, tetapi juga komunikasi yang dibuat dengan keyakinan rasmi oleh orang persendirian kepada pegawai awam (lihat perenggan 36 & 39).

(3) Mahkamah perlu terlebih dahulu menentukan sama ada komunikasi yang dipersoalkan telah dibuat kepada pegawai awam dengan keyakinan rasmi. Jika jawapannya adalah negatif, maka kenyataan s 134 perlu dizahirkan. Jika jawapannya adalah positif, maka ia adalah untuk pegawai berkenaan memutuskan sama ada kenyataan itu patut dizahirkan atau tidak. Menurut afidavit yang difailkan oleh Mohd Rizal bin Mohamad @ Harun, seorang pegawai penyiasat perayu, dalam membangkang permohonan responden untuk penzahiran, 38 orang yang telah ditemu duga oleh perayu datang dan memberikan maklumat yang telah direkodkan dalam kenyataan-kenyataan mereka atas dasar kenyataan itu adalah rahsia. Berdasarkan afidavit yang diberikan, ia jelas kenyataan s 134 adalah komunikasi yang dibuat oleh setiap daripada 38 orang itu kepada pegawai penyiasat perayu sepanjang kewajipan rasmi perayu sebagai pegawai awam di bawah Akta dan bahawa komunikasi telah dibuat secara kepercayaan rasmi. Mohd Rizal telah mendeposkan bahawa jika kenyataan s 134 diperintahkan untuk dizahirkan, saksi-saksi

masa hadapan tidak akan memberikan maklumat mereka kepada perayu dengan jaminan bahawa kenyataan mereka adalah rahsia. Ini, menurutnya, jelas menprejudiskan keupayaan perayu menjalankan siasatan masa hadapannya untuk kesalahan-kesalahan di bawah undang-undang sekuriti. Dalam erti kata lain, kepentingan awam akan terjejas oleh penzahiran kenyataan s 134 itu oleh kerana komunikasi itu dibuat dengan kepercayaan rasmi, ia adalah untuk pegawai itu menentukan sama ada kepentingan awam akan terjejas oleh penzahiran kenyataan s 134 itu. Dia telah menentukan bahawa ia akan berlaku sedemikian. Mahkamah ini tidak akan campur tangan. Oleh itu, Mahkamah Rayuan terkhilaf kerana memerintahkan penzahiran kenyataan s 134 menurut permohonan responden dalam lampiran 38 (lihat perenggan 48).]

Notes

For cases on privilege in general, see 7(2) *Mallal's Digest* (5th Ed, 2015) paras 2756–2812.

Cases referred to

BA Rao & Ors v Sapuran Kaur & Anor [1978] 2 MLJ 146, FC (refd)
Bookbinder v Tebbit (No 2) [1992] 1 WLR 217, QBD (refd)
D v National Society for the Prevention of Cruelty to Children [1978] AC 171, HL (refd)
Dato' Seri Anwar bin Ibrahim v PP [2010] 2 MLJ 312; [2010] 4 CLJ 265, FC (refd)
Duport Steels Ltd and others v Sirs and others [1980] 1 All ER 529, HL (refd)
Faber Merlin Malaysia Bhd v Ban Guan Sdn Bhd [1981] 1 MLJ 105, FC (refd)
Husdi v PP [1979] 2 MLJ 304 (refd)
Barlow Clowes Gilt Managers Ltd, In re [1992] Ch 208 (refd)
Joseph Hargreaves, Limited, In re [1900] 1 Ch 347, CA (refd)
Lonrho Ltd v Shell Petroleum Co Ltd [1980] 1 WLR 627, HL (refd)
Ong Boon Hua @ Chin Peng & Anor v Menteri Hal Ehwal Dalam Negeri, Malaysia [2008] 3 MLJ 625, CA (refd)
PP v Yip Yee Foo (Court of Appeal, Criminal Appeal No W-09–164 of 2009) (unreported) (refd)
R v Cheltenham Justices, ex parte Secretary of State for Trade and another [1977] 1 All ER 460, QBD (refd)
Loh Kah Kheng, Re [1990] 2 MLJ 126, HC (refd)
Rotta Research Laboratorium SpA & Anor v Ho Teck Sien & Ors [2010] 8 MLJ 733, HC (refd)
State of Uttar Pradesh v Raj Narain & Ors AIR 1975 SC 865, SC (refd)
The Public Prosecutor v Pocku Syed Ismail And Anr [1973] Cri LJ 931, HC (refd)
The State of Punjab Versus Sodhi Sukhdev Singh, (The State of Maharashtra) (1961) 2 MLJ 203; AIR 1961 SC 493, SC (refd)

Zainal bin Kuning & Ors v Chan Sin Mian Michael & Anor [1996] 3 SLR 121, CA (refd) A

Legislation referred to

Capital Markets and Services Act 2007 ss 177, 188, 201(6)(a), 360,
Criminal Procedure Code s 112 B
Evidence Act 1950 ss 123, 124, 126, 125, 162,
Evidence Act (Cap 97)[SG] s 126
Evidence Act 1872 [IND] ss 114, 123, 124
Rules of the High Court 1980 O 24, O 24 rr 7, 8, 13, 13(2), 15,
Securities Commission Act 1993 ss 15(1), 125, 134, 134(1), (4), (5), C
(11), 140, 144, 148
Security Industries (Central Depositories) Act 1991

Appeal from: Civil Appeal No W-02(IM)(NCC)-1290 of 2011 (Court of Appeal, Putrajaya) D

Shanti Geoffrey (Ahsani Mohd Nasir and Zul'Aida Zulkifli, Tommy Thomas and Ganesan Nethi with her) (Tommy Thomas) for the appellant.
Tan Hock Chuan (Mark Lau and Michelle Lai with him) (Sreenevasan Young) for the respondent. E

Ahmad Maarop FCJ:

[1] This is an appeal by the appellant (the plaintiff in the High Court), against the decision of the Court of Appeal made on 10 November 2011 which affirmed (with variation) the decision of the High Court in allowing in part the respondent's application for discovery of documents pursuant to O 24 of the Rules of High Court 1980 ('the RHC') in the civil action instituted by the appellant against the respondent. The leave to appeal was granted by this court on the following question: F G

> (i) Mengambil kira prinsip undang-undang dalam prosiding jenayah bahawa semua penyataan yang dibuat kepada, dan direkodkan oleh seorang Pegawai Siasatan Suruhanjaya Sekuriti berikutan daripada Seksyen 134(4) Akta Suruhanjaya Sekuriti, 1993 tidak boleh didedahkan kepada pihak pembelaan, samada Mahkamah Rayuan adalah benar dari segi undang-undang apabila memutuskan H bahawa sekalipun demikian, semua penyataan tersebut boleh didedahkan dalam prosiding sivil.
>
> (Having regard to the principle of law in criminal proceedings that all statements made to and recorded by an investigating Officer of the Securities Commission pursuant to Section 134(4) of the Securities Commission Act, 1993 are not be I disclosed to the defence, whether the Court of Appeal was right in law in ruling that all such statements are however disclosable in civil proceedings).

[2] The background facts of the appellant's action against the respondent are

these: the primary shareholder and Managing Director of Kenmark was one James Hwang Ding Kuo ('Hwang') a Taiwanese national. The appellant claimed that the manner in which Kenmark's affairs were conducted by Hwang from late May 2010 to June 2010 had led to a crash of its share price caused by the market's total lack of confidence in its future. It is the appellant's case that the respondent had been involved in the affairs of Kenmark in the following manner:

(a) on 2 June 2010 and 3 June 2010, the respondent acting through his family trust fund and a company controlled by him had caused the acquisition of Kenmark shares for a total gross purchase consideration of RM3,858,353. As at 3 June 2010, the respondent owned some 57,691,900, million shares in Kenmark, amounting to 32.36% of Kenmark's share capital;

(b) on 3 June 2010, at the meeting of the Board of Directors of Kenmark, four (4) new directors were appointed. The appointment was requested by Hwang at the respondent's direction;

(c) following his initial acquisition of the Kenmark shares, on 4 June 2010 and 6 June 2010, the respondent made false statements to the press as to the ability of Kenmark to resume operations and return to profitability, which would have the effect of raising the market price of Kenmark shares and inducing persons to purchase Kenmark shares, constituting a breach of s 177 of the Capital Markets and Services Act 2007 ('the CMSA'); and

(d) on 9 June 2010 and 11 June 2010, the respondent sold his shares in Kenmark. The total gross sum realised was RM10,160,636 amounting to a profit of RM6,302,303.13 for a six (6) day investment.

[3] In June 2010, the appellant commenced investigations into suspected offences committed under the securities laws in respect of Kenmark. In the course of investigations, 38 people were interviewed by the appellant's investigating officers pursuant to s 134 of the SCA.

[4] On 16 June 2010, upon the appellant's application, the High Court granted an ex parte interim order pursuant to s 360 of the CMSA, restraining the respondent from dissipating or otherwise dealing with funds believed by the appellant to be proceeds of offences committed by the respondent under the securities law.

[5] On 24 September 2010, the appellant commenced the present action against the respondent seeking the following reliefs:

(a) a declaration that the respondent made false or misleading statements or disseminated false or misleading information within the meaning of s

177 of the CMSA of the, inter alia, by making press statements attributed to him concerning the affairs of Kenmark from 3 June 2010 to 9 June 2010;

(b) a declaration that the respondent engaged in insider trading activities within the meaning of s 188 of the CMSA when on 9 June 2010 and 11 June 2010 he sold his shares in Kenmark for a consideration amounting to a total gross of RM10,160,636, thereby earning a profit or pecuniary gain of RM6,302,283; and

(c) an order that the respondent pay to the securities commission the sum of RM18,906,849 representing three times his profit or pecuniary gain of RM6,302,283 pursuant to s 200(2)(a) and/or s 201(6)(a) of the CMSA.

[6] By way of an application for discovery pursuant to O 24 of the RHC (encl 38), the respondent sought disclosure of the documents specified in annexure 'A' to the application:

1 All transcript(s) and/or statement(s) and/or minutes recorded of all persons orally examined by the plaintiff's Investigation Officers.

2 All memoranda passing between the plaintiff's departments in relation to the 1st Defendant's:

(i) alleged involvement in the acquisition and disposal of Kenmark shares as well as his alleged ownership of the said shares;

(ii) alleged involvement in the appointment of the 4 New Directors;

(iii) alleged dissemination of False Statements;

(iv) alleged possession of material price sensitive information.

3 All investigation papers and supporting documents relating to the 1st Defendant's:

(i) alleged involvement in the acquisition and disposal of Kenmark shares as well as his alleged ownership of the said shares;

(ii) alleged involvement in the appointment of the 4 New Directors;

(iii) alleged dissemination of False Statement;

(iv) alleged possession of material price sensitive information;

4 All notes and note books recording the alleged information the 1st Defendant is said to have informed the journalists/press as per items 98 to 172 of Exhibit A-2, in particular the Star newspaper and the Malaysian Reserve newspaper.

[7] On 4 May 2011, the High Court ordered the appellant to disclose all the documents specified in annexure A to the application and except the internal memoranda (specified in para 2) of the annexure. Disclosure of the documents

in para 4 was not objected to by the appellant and therefore is no longer an issue in dispute. The appellant appealed to the Court of Appeal against the decision of the High Court in allowing disclosure of the s 134 statements and the investigation papers (paras 1 and 3 of the annexure). On 10 November 2011, the Court of Appeal affirmed the High Court decision in ordering the disclosure of s 134 statements. However the Court of Appeal reversed the High Court's decision in allowing the disclosure of the investigation papers (specified in para 3 of the annexure). This part of the decision of the Court of Appeal was not challenged by the respondent. Thus the appellant's appeal before us concerns only the decisions of the courts below in ordering the disclosure of s 134 statements which are statements recorded from witnesses.

THE APPELLANT'S SUBMISSION

[8] Opening his submission, learned counsel for the appellant set out the background of the case, the gist of which we have set out earlier in this judgment. Learned counsel then took us through the powers of the appellants which was given the task of ensuring compliance with security laws which include the Security Industries (Central Depositories) Act 1991, and the Capital Market and Services Act 2007 ('CMSA'). He said that the appellant was the statutory body entrusted with the responsibility of regulating and developing systematically Malaysia's capital market. The appellant had the direct responsibility of supervising and monitoring the activities of market institutions, and regulating all persons licensed under the CMSA.

[9] Section 15(1) of the Securities Commission Act 1993 ('the SCA') provides the functions of the appellant which include:

> (b) to regulate all matters relating to securities and futures contracts;
>
> (c) to ensure that the provisions of the securities laws are complied with;
>
> (g) *to take all reasonable measures to maintain the confidence of investors in the securities and futures markets by ensuring adequate protection for such investors*
>
> (i) *to suppress illegal, dishonourable and improper practices in dealings in securities* and dealing in future contracts, and the provision of investment advice or other services relating to securities or future contracts; ...

[10] According to learned counsel, investigation into breaches of securities law are carried out by investigation officers appointed by the appellant under s 125 of the SCA. He said an investigation officer of the appellant required a complaint about any corporate wrongdoing or breach of securities law before investigation were commenced against a company or person. Invariably such complaints come from whistleblowers who are working in the companies

where the alleged wrongdoings take place, from members of the public and others who are brave enough to expose the alleged wrongdoings. According to learned counsel, no complainant, regardless of who he is, would like his or her identity disclosed. So, in order for such persons to make the necessary first contract with an officer of the appellant, they must be guaranteed confidentially, privacy and secrecy. Hence, he argued, expressed provisions under ss 140 and 148 of the SCA were legislated to protect complainants.

[11] On the crucial issue as to the effect of s 134(4) of the SCA, the thrust of learned counsel's argument is that the provision thereunder should not be read in a vacuum or in isolation. He contended that s 134 of the SCA was subject to substantive law of evidence (principally provided under the Evidence Act 1950), and procedural law of evidence, essentially provided under O 24 of the RHC. Submitting on the procedural aspect, learned counsel pointed out that the respondent's application for discovery was made under O 24 r 7 of the RHC. He submitted that the combined effect of O 24 r 7 and r 8 of the RHC gave the court a discretion whether to order discovery or otherwise, and that it is settled law that when a court is considering a contested discovery application under O 24 r 7, as in this case, the court is entitled to consider the order in its entirety. In this regard he cited O 24 r 13 of the RHC which provides:

> Rule 13(1) No order for the production of any documents for inspection or to the Court shall be made under any of the foregoing rules unless the Court is of opinion that the order is necessary either for disposing fairly of the cause or matter or for saving costs.
>
> (2) Where on an application under this Order for production of any document for inspection or to the Court privilege from such production is claimed or *objection is made to such production on any other ground*, the Court may inspect the document for the purpose of deciding whether the claim or objection is valid.

[12] He then cited O 24 r 15 which provides:

> Rule 15 The foregoing provisions of this Order shall be without prejudice to any rule of law which authorizes or required the withholding of any document on the ground that the *disclosure* of it would be *injurious to the public interest.*

[13] Learned counsel submitted that under O 24 r 13(2) of the RHC, in addition to privilege, a party could object to the production of documents 'on any other ground'. Thus, other heads of objection may evolve over time, and the court will lay down principles on a case by case basis, as in other branches of the law. He argued that on the other hand, O 24 r 15 referred to a separate head altogether, namely, that disclosure 'would be injurious to the public interest', which would include the 'public interest immunity' head of objection.

[14] Learned counsel submitted that in so far as substantive law was

concerned, the primary legislation was the Evidence Act 1950, in particular s 124 which he argued was applicable to investigation officers of the appellant who were regarded as 'public officers' for the purpose of written law. Learned counsel contended that the ground for resisting disclosure in this case was confidentiality. In support of his argument against non-disclosure on the basis of confidentiality, learned counsel cited a number of English authorities. He firstly cited *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171. He relied on the following passage from the judgment of Lord Denning MR which learned counsel claimed was accepted as good law by the House of Lords:

> Much of the discussion before us was about 'privilege.' When the word 'privilege' is used in law, it is used in a somewhat special sense. It is used to denote a privilege or right to keep things secret — to keep things back from your opponent or from the court — so that they cannot get to know of them: and ther eby be hindered in the trial of the case.
>
> I do not regard the N.S.P.C.C. as claiming any privilege in that sense. They do not claim any privilege or right to keep back the information. They say that may they have a duty not to disclose it. They *have a duty to preserve the confidence with which they have been entrusted. The question is not one of their privilege, but of their duty. How far should the court go to compel them to break this confidence?*
>
> To my mind it is all a question of balancing the competing interests. 'Confidentiality', as Lord Cross of Chelsea said in *Crompton (Alfred) Amusement Machines Ltd v Customs and Excise Comrs (No 2)* [1974] AC 405, at p 433*, 'is not a separate head of privilege'. But it is a very material consideration when deciding whether to compel disclosure.* In holding the scales of justice, the courts should not allow confidences to be lightly broken. When information has been imparted in confidence, and particularly where there is a pledge to keep it confidential, the courts should respect that confidence. *They should in no way compel a breach of it, save where the public interest clearly demands it, and then only to the extent that the public interest requires.*

[15] In support of his argument learned counsel also cited the following passage from the leading judgment of Lord Diplock in *D v National Society for the Prevention of Cruelty to Children* (at pp 220–221):

> *I see no reason and I know of no authority for confining public interest as a ground for non-disclosure of documents or information to the effective functioning of departments or organs of central government.* In *Conway v Rimmer* [1968] AC 910 the public interest to be protected was the effective functioning of a county police force; in In *D (infants), Re* [1970] 1 WLR 599 the interest to be protected was the effective functioning of a local authority in relation to the welfare of boarded-out children. *In the instant case the public interest to be protected is the effective functioning of an organisation authorised under an Act of Parliament to bring legal proceedings for the welfare of children. I agree with Croom-Johnson J. that this is a public interest which the court is entitled to take into consideration in deciding whether the identity of the N.S.P.C.C.'s informants ought to be disclosed. I also agree that the balance of public interest falls on the side of non-disclosure.*

[16] Learned counsel also cited the following English authorities in support of his submission: A

(a) *Lonrho Ltd v Shell Petroleum Co Ltd* [1980] 1 WLR 627;

(b) *In re Joseph Hargreaves, Limited* [1900] 1 Ch 347 CA;

(c) *R v Cheltenham Justices, ex parte Secretary of State for Trade and another* [1977] 1 All ER 460; B

(d) *In re Barlow Clowes Gilt Managers Ltd* [1992] Ch 208; and

(e) *Bookbinder v Tebbit (No 2)* [1992] 1 WLR 217. C

[17] Learned counsel submitted that the running theme in the cases he cited was that there must be a duty to investigate in the course of which assurance of confidentiality must be given expressly or impliedly as in this case. If by that assurance, statements were given, 'confidentiality', (sometimes as part of the rubric of privilege and sometimes as a part of public interest immunity), will be triggered overruling the other public interest. D

[18] Additionally, learned counsel also relied on the decision made by the Court of Appeal on 10 May 2010 in *Public Prosecutor v Yip Yee Foo* (Court of Appeal, Criminal Appeal No W-09–164 of 2009) (unreported), where according to learned counsel, the Court of Appeal held that statements under s 134 of the SCA were protected from disclosure in criminal proceedings as they were classified in the same category as statements recorded by the police in the course of its investigation under s 112 of the Criminal Procedure Code, which were privileged documents. Unfortunately, the Court of Appeal, High Court and the sessions court did not given written reasons for their decisions. According to learned counsel, as a result of that decision by the Court of Appeal, pursuant to which no leave application was filed in Federal Court, the law in Malaysia in relation to disclosure of s 134 statements in the context of criminal proceedings initiated by the appellant was settled, namely, that s 134 statements are not to be disclosed to the accused. According to learned counsel, one of the principal arguments motivating the security commission's argument in *Public Prosecutor v Yip Yee Foo* as to why s 134 statements could not be released to an accused in a criminal prosecution on behalf the security commission was, the danger that the said accused may contact, harrass or even threaten witnesses who have given statements to the security commission. Reliance was then placed on *Husdi v Public Prosecutor* [1979] 2 MLJ 304. In the context of the case before us, referring to the well-known rule referred to in *Husdi v Public Prosecutor* that there is no property in witness, learned counsel argued that the respondent, as the person who was buying and selling the Kenmark shares, would be in a position to interview persons involved in the said transactions and others familiar with the affairs of Kenmark. However, he contended that the respondent was not entitled to have access to s 134 E F G H I

statements recorded by the appellant's officers simply because there was a real danger that the respondent may approach the witnesses to change their statements. He cited the following passage in the judgment of Syed Othman J in *Husdi v Public Prosecutor*:

> Further, as a matter of public policy, I am of the view that it is undesirable for the prosecution to supply the defence with police statements, as there is a real danger of tampering with the witnesses.

[19] It was submitted that as a result of the decision of the Court of Appeal in *Public Prosecutor v Yip Yee Foo* and the impugned decision of the Court of Appeal in the present appeal, a person suspected by the appellant of committing offences under the securities laws will be allowed to seek discovery of s 134 statements if he is made subject of civil proceedings, but not if the appellant elects to charge him in criminal proceedings only. This, he argued could not be the approach intended by Parliament. Learned counsel argued that in the event that the appellant institutes both criminal and civil proceedings, the accused/defendant would be able to obtain the s 134 statements for use in the criminal proceedings through discovery in the civil proceedings. This, according to learned counsel amounts to unfair advantage in that the accused in the criminal proceedings will be privy to evidence that he is otherwise not entitled to, while conferring an advantage to an accused who is also sued over an accused who is not. He submitted that the practical effect of the decisions of the Court of Appeal in the two aforesaid cases would be that in future the appellant may become reluctant to institute civil proceedings because the intended defendant would be entitled to documents to which he would not have access had he been charged in criminal proceedings only. This, he said would stifle the appellant's right to institute civil proceedings in appropriate cases.

[20] Further, according to learned counsel, there will be instances, such as the present, where the appellant having discovered the commission of a suspected offence under the securities laws, will need to act immediately to institute civil proceedings seeking injunctive relief, in the form of a Mareva injunction, to restrain the offender from dealing with or disposing of the proceeds of the suspected offences. Once the said proceeds are restrained, the appellant will still have to continue its investigations, to gather evidence which may be used in its civil proceedings or — if the further evidence gathered supports it — criminal proceedings. It would result in grave prejudice to the appellant's criminal proceedings if such a defendant was entitled to discovery of s 134 statements merely because the appellant had obtained injunctive relief against him restraining the disposal of the proceeds of the offences committed under the securities laws.

[21] He submitted s 134 statements should be treated in the same way in both civil and criminal proceedings.

THE RESPONDENT'S SUBMISSION

[22] The thrust of the submission by learned counsel for the respondent is as follows. It is not in dispute that the documents sought are in the possession, custody or power of the appellant. The documents are relevant as they relate to the appellant's claim that the respondent was in breach of ss 177 and 188 of the CMSA. The documents are therefore necessary for disposing of the case fairly and to save costs. It was contended that the principles of discovery are trite and well-settled. In support of his contention learned counsel referred to *Faber Merlin Malaysia Bhd v Ban Guan Sdn Bhd* [1981] 1 MLJ 105 where this court held that:

> If it be the case that discovery is tied to the question whether it is relevant to any issue or question raised on the pleadings, then the court may order the determination of that issue or question before deciding on the extent of the order for discovery: Order 24 rule 4(1) Rules of the High Court 1980. But where the issue or question is clearly raised in the cause or matter, then equally clearly the order for discovery must be determined by the consideration whether it is necessary at the stage of the application.

[23] *Ong Boon Hua @ Chin Peng & Anor v Menteri Hal Ehwal Dalam Negeri, Malaysia* [2008] 3 MLJ 625 was also referred by learned counsel to support his submission on the guiding principle of discovery. He relied on the following passage in the judgment of the Court of Appeal:

> [33] The principles governing discovery were set out by the English Court of Appeal way back in 1882 in the case of *The Compagnie Financiere Et Commerciale Du Pacifique v The Peruvian Guano Company* (1882) 11 QBD 55. That case concerned the filing by the plaintiffs there of a further affidavit of documents pursuant to the English Rules of the Supreme Court 1875, Order XXXI r 12 thereof. Brett LJ writing a separate judgment for the Court of Appeal aptly laid down the principles of law in these fine language (see pp 62–63 of the report):
>
> > The doctrine seems to me to go farther than that and to go as far as the principle which I am about to lay down. *It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may — not which must — either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary.* I have put in the words 'either directly or indirectly,' because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences ...

[24] Learned counsel argued that in this case, there were disputes as to whether the respondent was involved:

(a) in the acquisition and disposal of Kenmark's shares as well as his alleged ownership of the said shares;

(b) in the appointment of the four new directors;

(c) in disseminating false statements; and

(d) in possession of material price sensitive information not available in the public domain.

Hence, it was contended that the documents asked for in encl 38 are in issue and obviously necessary for the trial court to know exactly what is the basis of the appellant's claim, apart from disposing of the case fairly. Learned counsel submitted that the rationale of the disclosure process is fairness to both sides, applying 'all cards on the table' approach. *Rotta Research Laboratorium SpA & Anor v Ho Teck Sien & Ors* [2010] 8 MLJ 733 was referred to in support of that submission.

[25] Continuing his submission, learned counsel for the respondent urged this court to decline the appellant's attempt in inviting the court to prefer the appellant's internal policy on the use and disclosure of s 134 statements over the clear provision under s 134(4) of the SCA, and the rules of discovery. Learned counsel added that the appellant is subject to the latter rules just like the Government of Malaysia or any statutory body. Learned counsel said that it was not in dispute that the appellant had examined and recorded statements from 38 persons. He therefore contended that by virtue of the clear provision under s 134(4) of the SCA, the statements must be subject to the rules of discovery. He submitted that a plain reading of s 134(4) of the SCA and s 134 as a whole, negated the appellant's case that s 134 statements were privileged or confidential. He advanced the following reasons:

(a) s 134 of the SCA 1993 does not provide that the statements are privileged or that they are classified in the same category as police statements under s 112 of the Criminal Procedure Code. Therefore, case laws on criminal procedure cannot apply in the context of civil proceedings;

(b) unlike s 134 of the SCA 1993, s 112 of the Criminal Procedure Code expressly protects all police statements made by any witness from disclosure;

(c) having chosen to commence civil proceedings first, the appellant is subject to the rules of discovery and the approach to discovery is all cards on the table;

(d) s 134 of the SCA 1993 does not impose a duty of confidentiality on the appellant and the interviewees;

(e) nor does the provision impose an obligation on the appellant and the interviewees to keep the transcipts and statements of the examination confidential; and

(f) furthermore, s 134 of the SCA 1993 compels future witnesses to 'co-operate' with the appellant, as they are 'legally bound to answer all question ... put to him by the investigating officer of the SC ... and shall not refuse to answer any question on the ground that it tends to incriminate him ...' Under the Criminal Procedure Code, a person may refuse to answer any question which would have a tendency to expose him to a criminal charge, penalty or forfeiture.

[26] Concluding his submission in support of the decision of the Court of Appeal, learned counsel contended that the language under s 134(4) of the SCA is plain and clear - s 134 statements are admissible as evidence in court. Such being the position, he submitted that the literal or grammatical meaning must be given to it without consideration of other interpretative criteria because Parliament must be taken to mean what it says and that changes in the law are for Parliament to decide, not for the judiciary, and that judges interpret the law. In support of that principle of statutory interpretation he referred to the judgment of this court in *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2010] 2 MLJ 312 at p 326; [2010] 4 CLJ 265 at p 281. Learned counsel also relied on the following passage from the judgment of Lord Diplock in the House of Lords case of *Duport Steels Ltd and others v Sirs and others* [1980] 1 All ER 529 at pp 541–542:

> ... Parliament makes the laws, the judiciary interpret them ... *the role of the judiciary is confined to ascertaining from the words that Parliament has approved as expressing its intention what that intention was, and to giving effect to it. Where the meaning of the statutory words is plain and unambiguous it is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient, or even unjust...*
>
> ... it is for Parliament, not for the judiciary, to decide whether any changes should be made to the law as stated in the Acts, and if so, what are the precise limits that ought to be imposed ... *It endangers continued public confidence in the political impartiality of the judiciary, which is essential to the continuance of the rule of law, if judges, under the guise of interpretation, provide their own preferred amendments to statutes which experience of their operation has shown to have had consequences that members of the court before whom the matter comes consider to be injurious to the public interest ...*

[27] In the context of the present case, learned counsel submitted that only Parliament can change the law to extend protection from disclosure of the s 134 statements in criminal proceedings (assuming one exists) to civil proceedings; the courts' function is to interpret the law and not to make law. Learned

counsel added that in this case the moment the appellant decided to commence civil claim against the respondent, there was no longer prejudice to the appellant's investigative powers because presumably, the appellant must have concluded and obtained cogent evidence that the respondent acted in breach of the CMSA.

DECISION OF THIS COURT

[28] As is clear from the judgment of the Court of Appeal the issue before it was whether the s 134 statements and the investigation papers were privileged documents. In its judgment the Court of Appeal held as follows:

> 32 As can be seen above, Section 134(4) is clear and explicit. It provides in no uncertain terms that any statement made and recorded under section 134 shall be admissible as evidence in any proceeding in any Court. Therefore, on the construction ofSection 134(4), when the words used are clear and unambiguous, they must be given their plain meaning.
>
> 33 In *Stock v Frank Jones (Tipton) Ltd* [1978] 1 All ER 948, Lord Simon of Glaisdale cited Lord Wensleydale's golden rule of statutory construction, whereby one is to apply statutory words and phrases according to their nature and ordinary meaning without addition or subtraction, unless that meaning gives rise to an absurdity, injustice or contradiction in which case the offending word can be modified.
>
> 34 This is of course an acceptable exception to the general rule that plain language excludes a consideration of mischievousness or absurdity. Since nothing of the sort has been demonstrated in this case, there is no reason to depart from the general rule.
>
> 35 Thus since under Section 134(4), *such statements are allowed to be admissible, we find that the learned judge was correct in ordering discovery.*
>
> 36 Thus to reiterate:-
>
> (i) Upon construing the words expressed in Section 134, witnesses are compelled to cooperate in the investigation of securities offences by answering all the questions imposed on them. Such statements which must be reduced in writing and signed by the witnesses shall be admissible as evidence in any court proceedings.
>
> (ii) Based on Section 134(10) *and* (11) of the SCA, upon investigations, in the event of there being sufficient evidence for the commencement or continuance of any court proceedings against any person the witnesses are compelled to give evidence in court. For this purpose, they are required to execute a bond to appear before the court. Otherwise, a warrant or summons to secure the attendance of the witnesses may be issued against them.

37 We are therefore unanimous in our decision in that we find no merit in this Appeal. We agree with the learned High Court Judge (subject to variation), that Section 134(4) is clear and unambiguous. In relation to the Court of Appeal's decision in PP v Yip Yee Foo, it should be pointed out that this was in relation to criminal proceedings. In criminal proceedings, the right to disclosure of statements made in the investigation of an offence is a statutory right and is thus subject to the construction of relevant statutory provisions, particularly those under the Criminal Procedure Code. Therefore, Section 134(4) has to be read in the light of the statutory provisions as well as case laws on criminal procedure which do not apply in the context of civil proceedings.

38 Once a considered choice is made by the one party in authority (ie when the appellant chose the civil process) as in the instant appeal, that party has to make the relevant documents available to the other party.

39 Further, as a matter of public policy it is undesirable for the prosecution in a criminal trial to supply the defence with the statements obtained in the course of investigation, as there is a real danger of tampering with witnesses.

40 However in a suit such as the present, the respondent is the defendant in a civil action brought by the appellant. One must look to the Securities Commission Act 1993 in deliberating as to whether the statements of witnesses and the Investigation papers ought to be supplied to the appellant. In our view, what is not privileged would be liable to be disclosed. However we have a caveat to this proposition.

41 We are mindful of the sensitivity of the issues at hand and having to balance those against the right of the respondent to mount his defence.

42 Thus in the circumstances, our order is this. Whilst we affirm the Order of the High Court, we however vary the said Order to the extent that the respondent is to avail himself only to the documents and not the Investigation files relating to the investigation against the respondent in relation to the allegations in paragraphs (i) to (iv) in Item 3 of Annexure A.'

[29] Essentially, the reasoning of the Court of Appeal in allowing the disclosure of the s 134 statements is as follows. Section 134(4) of the SCA is clear and explicit that statements made under s 134 shall be admissible as evidence in any proceeding in any court. Therefore when the words used under s 134(4) are clear and unambiguous, they must be given their plain meaning. The Court of Appeal then concluded that since under s 134(4), such statement (ie the statements made under s 134) are admissible, the learned High Court judge was correct in ordering the disclosure of such statements in this case. However, the Court of Appeal held that in criminal proceedings, the right to disclosure of statements made in the investigation of an offence is a statutory right, and thus is subject to the construction of the relevant statutory provisions, particularly those under the Criminal Procedure Code, and that therefore s 134(4) has to be read in the light of the statutory provisions as well

as case laws on criminal procedure which do not apply in the context of civil proceedings. Further, as a matter of public policy it is undesirable for the prosecution in a criminal trial to supply the defence with statements obtained in the course of investigation, as there is a real danger of tampering with witnesses. The Court of Appeal held however that in a suit as in the present case, the respondent is the defendant in a civil action instituted by the appellant. In such a case, one must look to the SCA in deciding whether the statements of witnesses and the investigation papers ought to be supplied to the respondent. The Court of Appeal opined that what is not privileged would be liable to disclosure. The Court then affirmed the order of the High Court to the extent that only the s 134 statements are to be disclosed to the respondent but not the investigation files. For reasons which we will set out in a moment, we are, with respect, unable to agree with the decision of the Court of Appeal in ordering the disclosure of the s 134 statements in the present case.

[30] Section 134(1) to (5) of the SCA provides as follows:

> ((1) If an Investigating Officer of the Commission carrying out an investigation under any securities law suspects or believes on reasonable grounds that any person can give information relevant to a matter that he is investigating, the Investigating Officer of the Commission may by notice in writing to such person require such person-
>
> (a) to give to the Investigating Officer of the Commission all reasonable assistance in connection with the investigation; and
>
> (b) to appear before a specified Investigating Officer of the Commission or specified Investigating Officers of the Commission to be examined orally.)
>
> ((1A) An Investigating Officer of the Commission exercising his authority under paragraph (1)(b) shall reduce into writing any statement made by the person examined under subsection (1)).
>
> (2) A person referred to in subsection (1) shall be legally bound to answer all questions relating to such case put to him by the Investigating Officer of the Commission and to state the truth, whether or not the statement is made wholly or partly in answer to questions, and shall not refuse to answer any question on the ground that it tends to incriminate him.
>
> (3) A statement made by any person under this section shall be taken down in writing or recorded and subsequently taken down in writing and signed by the person making it or affixed with his thumb print, as the case may be, after it has been read to him and after he had been given an opportunity to make any correction he may wish:
>
> Provided that, where the person examined refuses to sign or affix his thumb print on the statement, the Investigating Officer of the Commission shall endorse thereon under his hand the fact of such refusal and the reason therefor, if any, stated by the person examined.

((3A) In an examination of a person under subsection (1), an Investigating Officer of the Commission or Investigating Officers of the Commission examining the person may do any one or both of the following:

(a) give directions about who may be present during the examination, or during any part of it;

(b) record the examination or any part of it by audio or visual recording or a combination of both.

(4) *Any statement made and recorded under this section shall be admissible as evidence in any proceeding in any Court.*

(5) Any person who —

(a) fails to appear before an Investigating Officer of the Commission as required under subsection (1);

(b) refuses to answer any question put to him by an Investigating Officer of the Commission as required under subsection (2) or neglects to give any information which may reasonably be required of him and which he has in his power to give;

(c) knowingly furnishes to an Investigating Officer of the Commission information or statement that is false or misleading in any material particular;

(d) obstructs an Investigating Officer of the Commission in carrying out an investigating under this section.

shall be guilty of an offence and shall on conviction be punished with to a fine not exceeding one million ringgit or imprisonment for a term not exceeding five years or both.

[31] Essentially, the Court of Appeal allowed the disclosure of the s 134 statements because it held that s 134(4) of the SCA was clear that statements made under s 134 were admissible in evidence. That, in our view, is an over simplication of the crucial issue in the case especially in view of a claim of privilege from disclosure of the s 134 statements. Evidence is admissible and should be received by the court unless there is legal reason for its exclusion. Evidence of relevant facts becomes inadmissible when its reception offends against public policy (or public interest) or a particular rule of law, an example of which is evidence of matters which are privileged against disclosure. Explaining this, the Supreme Court of India in *State of Uttar Pradesh v Raj Narain & Ors* AIR 1975 SC 865 (reffered to in *BA Rao & Ors v Sapuran Kaur & Anor* [1978] 2 MLJ 146 (FC)) said:

24 *Evidence is admissible and should be received by the Court to which it is tendered unless there is a legal reason for its rejection. Admissibility presupposes relevancy. Admissibility also denotes the absence of any applicable rule of exclusion. Facts should not be received in evidence unless they are both relevant and admissible.* The principal rules of exclusion under which evidence becomes inadmissible are two-fold. First,

A evidence of relevant facts is inadmissible when its reception offends against public policy or a particular rule of law. Some matters are privileged from disclosure. A party is sometimes estopped from proving facts and these facts are therefore inadmissible. The exclusion of evidence of opinion and of extrinsic evidence of the contents of some documents is again a rule of law. Second, relevant facts are, subject
B to recognised exceptions inadmissible unless they are proved by the best or the prescribed evidence.

25 A witness, though competent generally to give evidence, may in certain cases claim privilege as a ground for refusing to disclose matter which is relevant to the issue. Secrets of state papers, confidential official documents and communications
C between the Government and its officers or between such officers are privileged from production on the ground of public policy or as being detrimental to the public interest or service.

[32] In other words, the provision under s 134(4) of the SCA must be read
D subject to the rules of privilege and prohibition on the grounds of public policy. In our view, this applies to civil as well as criminal proceedings. In the context of the present appeal, the relevant and applicable rules for consideration are housed in ss 123 and 124 of the Evidence Act 1950. Explaining that ss 123 and 124 of the Indian Evidence Act (Similar to ss 123 and 124 of our Evidence Act
E 1950), constituted a clear departure from the ordinary rules of evidence under which all material documents must be produced, the High Court of Andhra Pradesh in *The Public Prosecutor v Pocku Syed Ismail And Anr* [1973] Cri LJ 931 said:

F Sections 123, 124 and 125 of the Actconstitute a clear and significant departure from the ordinary rules of evidence whereunder all the material documents had to be proved or else the presumption under Section 114 will have to be drawn. The aforesaid provisions do not permit any adverse inference or presumption under Section 114 where the concerned party is the State and the disclosure of the information or source is detrimental to public interests. The basis and foundation of
G the deviation from the ordinary rules of evidence where the concerned party is the State is public interest which is paramount. Where a conflict between public and private interests arises, the former must prevail. To put it differently,private interests must yield to or give way to public interests whenever a conflict arises between the two.

H

[33] Indeed, the extreme importance of the exclusionary rules which exclude evidence the disclosure of which would be injurious to the public interest is clearly seen in O 24 r 15 of the RHC which provides that the provision of O 24 on disclosure 'shall be without prejudice to any rule of law which authorises or
I requires the withholding of any document on the ground that the disclosure of it would be injurious to the public interest'.

[34] Thus, if either s 123 or s 124 of the Evidence Act 1950 applies, the 134 statements from witnesses in this case shall not be disclosed.

[35] Under s 123 of the Evidence Act, no one shall be permitted to produce any unpublished official record relating to affairs of state, or to give evidence derived there from. In Malaysia the law on s 123 of the Evidence Act 1950 was explained by the Federal Court in *BA Rao v Sapuran Kaur* where Raja Azlan Shah FC (As His Royal Highness then was) said:

> In India, as in Malaysia, the law on the subject is contained in sections 123 and 162 of the Evidence Act. ... In 1975 the Supreme Court clarified the law relating to executive privilege. In the *State of Uttar Pradesh v Raj Narain* AIR 1975 C 865 the Supreme Court took the following stand:
>
> > *The foundation of the law behind* sections 123 *and* 162 of the Evidence Act*is the same as in English law. It is that injury to public interest is the reason for the exclusion from disclosure of documents whose contents if disclosed would injure public and national interest. Public interest which demands that evidence be withheld is to be weighed against the public interest in the administration of justice that courts should have the fullest possible access to all relevant materials. When public interest outweighs the latter, the evidence cannot be admitted.* The court will proprio motu exclude evidence the production of which is contrary to public interest. *It is in public interest that confidentiality shall be safeguarded. The reason is that such documents become subject to privilege by reason of their contents. Confidentiality is not a head of privilege. It is a consideration to bear in mind. It is not that the contents contain material which it would be damaging to the national interest to divulge but rather that the documents would be of class which demand protection.* To illustrate the class of documents would embrace Cabinet papers, Foreign Office dispatches, papers regarding the security of the State and high level inter-departmental minutes. In the ultimate analysis the contents of the documents are so described that it could be seen at once that in the public interest the documents are to be withheld.
>
> > ...
>
> > In this country, objection as to production as well as admissibility contemplated in sections 123 and 162 of the Evidence Act is decided by the court in an enquiry of all available evidence. This is because the court understands better than all others the process of balancing competing considerations. It has power to call for the documents, examine them, and determine for itself the validity of the claim. Unless the court is satisfied that there exists a valid basis for assertion of the privilege, the evidence must be produced. This strikes a legitimate balance between the public and private interest. Where there is a danger that disclosure will divulge, say, State secrets in military and international affairs or Cabinet documents, or departmental policy documents, private interest must give way. It is for the court, not the executive, ultimately to determine that there is a real basis for the claim that "affairs of State is involved", before it permits non-disclosure. While it is clear that the final decision in all circumstances rests with the court, and that the court is entitled to look at the evidence before reaching a concluded view, it can be expected that categories of information will develop from time to time. It is for that reason that the legislature has refrained from defining 'affairs of State'. In my opinion, 'affairs of State', like an elephant, is perhaps easier to

A recognise than to define, and their existence must depend on the particular facts of each case.

[36] It appears to us that the appellant's case of non-disclosure of the s 134 statements is based on the privilege provided under s 124 of the Evidence Act 1950. So, the question for our consideration is whether s 124 applies. The section provides:

> No public officer shall be compelled to disclose communications made to him in official confidence when he considers that the public interest would suffer by the disclosure:
>
> Provided that the court may require the head of the department of the officer to certify in writing whether or not such disclosure would be detrimental to the public interest and, if the head of the department certifies that such disclosure would not be prejudicial to the public interest, then the officer shall disclose the communications.

[37] The provision under s 124 is supplementary to s 123 and gives effect to the same principle of public policy, namely, prejudice to public interest by disclosure. In *Woodroffee and Amir Ali the law of Evidence* 19th Ed (2013) at p 4834 the learned authors explained:

> Section 124 is really supplementary to the previous section and gives effect to the same principle of public policy: prejudice to the public interest by disclosure.
>
> ...
>
> If the giving of such evidence would be injurious to the public interest, the general public interest must be considered paramount to the individual interest of a suitor in a court of justice. The public officer concerned, and not the judge, is to decide whether the evidence referred to in these sections shall be given or withheld, because the judge would be unable to determine this question without ascertaining what the document or communication was and why the publication or disclosure of it would be injurious to the public interest - an inquiry which cannot take place in private and which, taking place, may do all the mischief which it is proposed to guard against.

[38] In this regard, we find the following explanation on ss 123 and 124 of the Indian Evidence Act (similar to ss 123 and 124 respectively of our Evidence Act 1950) by the High Court in *The Public Prosecutor v Pocku Syed Ismail And Anr* [1973] Cri LJ 931, to be useful:

> The prime object of Section 124 is to prevent disclosures to the detriment of public interest. (Vide *Nagaraja Pillai v Secy of State) ILR 39 Mad 304 = (AIR 1915 Mad 1113). The very basis and foundation of the claim of privilege conferred on public officers under* Section 124 *is that the disclosure of the contents or information made to public officers in official confidence cannot be made without injury or detriment to public interests.* See *Henry Greer Robinson v State of South Australia* AIR 1931 PC 254. It is apposite to notice what the learned Judge Wassoodew J., speaking for the

Court, in *Bhalchandra v Chanbasappa* AIR 1939 Bom 237 at p. 247 had said about the basis for the privilege under Section 124:

> ... it is essential to bear in mind the cardinal fact that privilege does not attach to a document merely because it is a State or official document. The foundation of the claim rests on the consequence of disclosure of a communication made in official confidence whose publication the officer to whom it is made considers contrary to the public interests.
>
> ...
>
> ...
>
> Section 123 prohibits any one from giving evidence based on unpublished official records relating to any affairs of State, without the permission of the officer or the head of the department concerned. Section 124 *entitles a public officer to claim privilege of withholding production of any communication received by him in official confidence, if, in his opinion the disclosure of the contents of the document or information is injurious or detrimental to public interests. ...*
>
> ...
>
> Sections 123, 124 and 125 of the Act constitute a clear and significant departure from the ordinary rules of evidence whereunder all the material documents had to be proved or else the presumption under Section 114 will have to be drawn. The aforesaid provisions do not permit any adverse inference or presumption under Section 114 where the concerned party is the State and the disclosure of the information or source is detrimental to public interests. The basis and foundation of the deviation from the ordinary rules of evidence where the concerned party is the State is public interest which is paramount. Where a conflict between public and private interests arises, the former must prevail. To put it differently, private interests must yield to or give way to public interests whenever a conflict arises between the two. Whenever the question of privilege under the aforesaid provisions of Act arises for determination the Court has to consider and determine class or character of the document or information sought to be withheld from being produced or disclosed by the concerned person.

[39] Under s 124 of the Evidence Act 1950, only communications made to public officer in official confidence are privileged. Any communication which is treated as confidential and made to a public officer under an honest and bona fide belief that he would keep the contents of or the information contained in such communication confidential without disclosing the same to others would come within the ambit of s 124. It is settled that s 124 of the Evidence Act 1950 includes not only communications made in official confidence by one public officer to another, but also communications made in official confidence by private person to a public officer. This was explained by the court in the *The Public Prosecutor v Pocku Syed Ismail And Anr* [1973] Cri LJ 931:

> 7 In the light of the forgoing discussions, we shall examine the plea advanced on behalf of the accused that the communication in the instant case being one made by a private citizen to the Assistant Collector, Central Excise and Customs. Section 124

of the Act is not attracted, the provisions of Section 124 do not permit such an interpretation. The section is silent with regard to the source from which the communication should be made to a public officer. It only speaks of communications made to a public officer in official confidence. It does not specifically indicate that the communication privileged under Section 124 are only communications made by one public officer to another officer. It is, therefore immaterial who made the communications to the public officer in order to attract the privileges envisaged under Section 124. The ingredients of Section 124 *must be held to have been satisfied if the communication is made to a public officer either by a private citizen or another public officer in official confidence and if the public officer considers that the disclosure of the contents of the same would injure public interest.* The very intendment and purpose of Sections 123, 124 and 125 is to safeguard the interests of general public. Hence the provision of Section 124 must be construed liberally so as to take it within their ambit any communication made to public officer in official confidence, irrespective of the person who communicates.

[40] The next crucial question relates to the significance and effect of the words 'in official confidence' under s 124 of the Evidence Act. Again the judgment in *The Public Prosecutor v Pocku Syed Ismail And Anr* [1973] Cri LJ 931 provides useful reference. The court said:

> The heart of the matter is whether the disclosure of the communication would result in an injury to the public interest and it would not amount to betrayal of person who under a bona fide and honest impression that the source as well as the contents thereof would not be published made that communication to the public officer. In other words the information though of a confidential nature, is given by a citizen or an officer to a public officer to enable him to take appropriate action and protect public interests. The object of Section 124 is to enable the public officer in discharge of his duties to take immediate and appropriate action and protect the interests of the general public. If the public officer has to publish the source as well as the contents of the information, persons would not generally come forward out of free will and volition to furnish such confidential information to the public officer. We may usefully refer to what has been observed by a Division Bench of the Bombay High Court in AIR 1939 Bom 237 at p 247 in this context:-
>
> > *in my opinion a communication in offical confidence requiring protection under* Section 124 Evidence Act*, must be such as to necessarily involve the wilful confiding of secrets with a view to avoid publicity by reason of the official position of the person in whom trust is reposed, under an express or implied promise of secrecy. The test must be whether the disclosure would result in betrayal of the person confiding by the publication of the communication having regard to the nature thereof.* The prerogative right therefore has to be distinguished from the evidence showing how it arises in a particular case.

[41] Although confidentiality itself is not a separate head of immunity, there are, however, cases when confidentiality is itself a public interest and one of these is where information is given to an authority charged with the enforcement and administration of the law by the initiation of court

proceedings. Whether there be other cases, and what these may be, must fall to be decided in the future. The categories of public interest are not closed, and must alter from time to time whether by restriction or extension as social conditions and social legislation develop, (see Lord Hailsham of St Marylebone in *D v National Society for the Prevention of Cruelty to Children* at p 230.

[42] On the effective functioning of departments or organs of central government as a ground of non-disclosure of documents or information on public interest, in *D v National Society for the Prevention of Cruelty to Children*, Lord Diplock said at pp 220–221:

> *I see no reason and I know of no authority for confining public interest as a ground for non-disclosure of documents or information to the effective functioning of departments or organs of central government.* In *Conway v Rimmer* [1968] AC 910 the public interest to be protected was the effective functioning of a county police force; in In re *D (Infants)* [1970] 1 WLR 599 the interest to be protected was the effective functioning of a local authority in relation to the welfare of boarded-out children. *In the instant case the public interest to be protected is the effective functioning of an organisation authorised under an Act of Parliament to bring legal proceedings for the welfare of children. I agree with Croom-Johnson J. that this is a public interest which the court is entitled to take into consideration in deciding whether the identity of the NSPCC's informants ought to be disclosed. I also agree that the balance of public interest falls on the side of non-disclosure.*

[43] The additional fact that to break the seal of confidentiality would endanger public interest, will in most cases probably lead to the conclusion that disclosure would be withheld. In this regard, in *D v National Society for the Prevention of Cruelty to Children* Lord Edmund Davies said at p 246:

> (v) The mere fact that relevant information was communicated in confidence does not necessary mean that it need not be disclosed. But where the subject matter is clearly of public interest, the additional fact (if such it be) that to break the seal of confidentiality would endanger that interest will in most (if not all) cases probably lead to the conclusion that disclosure should be withheld. And it is difficult to conceive of any judicial discretion to exclude relevant and necessary evidence save in respect of confidential information communicated in a confidential relationship.

[44] The importance of the assurance of confidentiality to statutory bodies having statutory duty of investigation was explained in *Lonrho Ltd v Shell Petroleum Co Ltd*. The case concerns documents which had come into existence in connection or for the purpose of a private inquiry (the Bingham Inquiry) appointed by the Secretary of State For Foreign and Commonwealth Affairs pursuant to article 15 of and Schedule to the Southern Rhodesia (United Nations Sanctions) (No 2) Order 1968, to conduct investigation into the supply of petroleum and petroleum products to Rhodesia contrary to sanctions imposed by the United Nations. The documents included transcripts of oral evidence of witnesses and written submissions made to the inquiry, as well

certain correspondence made to the members of the inquiry. The question 2 was whether public interest immunity from disclosure of the documents ought to prevail. The House of Lords held that it did. In his leading judgment, Lord Diplock said:

> Many judges have at some time in their lives had experience of conducting official inquiries or investigations in private. Even without the Minister's certificate I should not have needed evidence to satisfy me that the likelihood of success of an inquiry of this kind in discovering the truth as to what happened is greatly facilitated if those persons who know what happened come forward to volunteer information rather than waiting to be identified by the inquiry itself as likely to possess relevant information and having it extracted from them by question and answer. *Nor would I need any evidence to satisfy me that without an assurance of complete confidentiality information is less likely to be volunteered*; particularly where the inquiry is directed to matters that are the subject matter of pending civil action to which the possessor of the information is a defendant. ... My Lords, as was fully recognised by the judge and the Court of Appeal, this claim to public interest immunity from discovery was a claim for nondisclosure not because of the contents of the individual documents but because of the class to which they belong. Like all class claims the basis of it is pour encourager les autres. As the Minister put it in his certificate:
>
> > *It is important to the proper working of such an investigation as that chaired by Mr. Bingham and also of many other bodies who have the statutory duty of investigation and of finding facts, that witnesses should not be discouraged from coming forward to give evidence or from giving evidence fully and freely. In my opinion, there is serious risk that such witnesses would be discouraged if, despite express or implied assurances of confidentiality, the information which they provide could be made public, and they themselves laid open to* possible attack at the suit anyone with whom they may have business dealings, including competitors. In my opinion, *the disclosure of information and documents furnished and produced to Mr Bingham and Mr Gray would impede the work of any body which may be set up in the future to obtain evidence and information or to establish whether or not any offences may have been committed in similar circumstances.* In my view, it is necessary for the proper and efficient functioning of such an investigation that the (Bingham documents) should be withheld from production.

Robert Golf J accepted that, while weight ought to be given to this certificate, it was for him not for the Minister to decide whether the public interest against disclosure relied on by the Minister outweighed the general public interest that in the administration of justice, whether by courts of law or by arbitrators, the decision should be based upon all the facts that are relevant, to the fullest extent that available procedures enable them to be ascertained. The various matters that he ought to take into consideration in balancing the one public interest against the other are summarised in his judgment with clarity and accuracy by reference to the relevant authorities dating from *Conway v Rimmer* [1968] AC 910. He came to the confident conclusion that the public interest immunity from disclosure ought to prevail in the particular circumstances of the instant case. The Court of Appeal unanimously agreed with him-and so do I.

[45] In *The State of Punjab Versus Sodhi Sukhdev Singh, (The State of Maharashtra)* (1961) 2 MLJ 203; AIR 1961 SC 493, the Supreme Court of India held that:

> It is clear, and indeed it is not, disputed, that in dealing with an objection against the production of a document raised under s 124 the court would have first to determine whether the communication in question has been made in official confidence. If the answer to the said question is in the negative then the document has to be produced ; if the said answer is in the affirmative then it is for the officer concerned to decide whether the document should be disclosed or not.

[46] In *Re Loh Kah Kheng* [1990] 2 MLJ 126, the High Court held that before privilege under s 124 of the Evidence Act 1950 can apply, the condition precedent that the information be communicated in official confidence must be satisfied. The court is the sole judge of this question, and in coming to its decision can not only inspect the document, but can also take other evidence to determine its admissibility. *Re Loh Kah Kheng* was followed in the Singapore case of *Zainal bin Kuning & Ors v Chan Sin Mian Michael & Anor* [1996] 3 SLR 121 where the Court of Appeal in applying s 126 of the Singapore Evidence Act (Cap 97) (similar to s 124 of the Evidence Act 1950), ruled at p 130 that:

> On the true construction of this section, *it is for the court to decide whether the communication in question was made to the public officer in official confidence and it is for the officer concerned to decide whether public interests would suffer by the disclosure of the communication:* see Sarkar's *Law of Evidence*; *Re Neo Guan Chye, deceased* [1935] 1 MLJ 271, at p 272 and *Re Loh Kah Kheng* [1990] 2 MLJ 126, at p 127. In Neo Guan Chye, there was an application for an order requiring the Commissioner of Estate Duties to give discovery of an affidavit for the Commissioner of Stamps filed by another person who was not a party. An objection was taken by the Solicitor-General who relied, inter alia, on what was then s 124 of the Evidence Ordinance (which is now s 126 of the Evidence Act). Terrel J held that that document was not one made in 'official confidence' within the meaning of that section. He said, at p 272:
>
> > It is to be noted, *however that while* s 124 of the Evidence Ordinance *makes the public officer the sole judge as to whether the disclosure of a confidential document would or would not be contrary to the public interest, it presumes, as a condition precedent, that the document was a communication made to him in official confidence. This is a matter for the court to decide,* see *The Collector of Jampur v Jamma Prasad* ILR 44 All p 360 at p 365, and for the reasons stated above I do not think that the affidavit for the Commissioner of Stamps is a document made in 'official confidence' within the meaning of s 124 of the Evidence Ordinance.
>
> A similar conclusion was arrived at by the High Court in Malaysia in *Re Loh Kah Kheng*, where Mohamed Dzaiddin J said at p 127:
>
> > The commentary in Sarkar's Law of Evidence(13th Ed), p 1230 says that the occasion for claiming privilege under s 124 arises only when the evidence sought to be given is a communication made to a public officer 'in official confidence'.

> That is the condition precedent before privilege can be claimed. Therefore, the important question to be decided first by the learned magistrate is whether or not the communication was made to DSP Foong 'in official confidence'. The court is the sole judge of this question. This she can decide not only by inspecting the document, but can also take 'other evidence' to determine on its admissibility (s 162(2)). If she determines that the communication was not made 'in official confidence', the occasion for claiming privilege is then non-existent. Further, the proviso to our s 124 states that the court may require the head of the department of the officer to certify in writing whether or not such disclosure would be detrimental to public interest. If the court holds that the communication was made in official confidence, it rests exclusively with the head of the police department to withhold or allow disclosure depending on whether or not it would be prejudicial to the public interest.
>
> It is amply clear to us that the documents in question were communications made by one public officer to another in the discharge of their official duties and were made in official confidence within the meaning of s 126 of the Evidence Act. There were filed affidavits sworn to or affirmed by Mr Cheok Koon Seng, the officer in charge, Mr Seng Kwang Boon, the deputy public prosecutor and Mr Chan Sek Keong, the Attorney- General. They have all indicated that the information in the documents was given or received as part of the official duties of the officers concerned, and they stated that public interests would suffer by the disclosure of these communications made to them in official confidence. The determination by these officers bona fide that public interests would suffer by the disclosure is conclusive. The learned judge was fully justified in refusing discovery of these documents.

[47] In *The Public Prosecutor v Pocku Syed Ismail And Anr* [1973] Cri LJ 931, the information in respect of which privilege under s 124 was claimed was communicated by a private citizen to and recorded in a statement by the assistant collector, central excise and customs. The information led to the issue of search warrant as well as consequent raid and seizure of huge quantity of contraband gold from the premises of the respondents. In upholding the claim of privilege by the collector, central excise and customs under s 124, the court remarked:

> It is the public officer ie, the collector, central excise and customs herein who is competent to decide whether the disclosure of the contents of the document in question would injure public interests or not. The court will not interfere with the discretion exercised by the Public Officer in this regard unless the exercise of the discretion by the officer on a perusal of the contents of the document, is found to be perverse, mala fide and unjust. In the case on hand the collector central excise while sending the document in question to the court, has expressed that it is not in public interest to disclose or divulge its contents. Admittedly on the information furnished by the informant, a private citizen, in the statement recorded by the assistant collector the search of the premises of the accused has been made. The sudden raid and the search resulted in unearthing of huge quantity of contraband gold. The information had been furnished by the informant to the public officer who, would not divulge or disclose the source and contents of his statement but make use of the

same for protecting and safeguarding the interests of the public revenue. *Any publicity of the contents as well as the source of the statement by producing the same in a court of law would certainly amount to breach of confidence reposed by the informant in the public officer at the time of its making. It is indeed detrimental to the interests of the democratic welfare State like ours to disclose or divulge the names of spies, decoys or Informers as well as the contents of the document or information which are confidential in nature.* Very many citizens would refrain from giving any information relating to offences against the State to the concerned public officers for fear or dislike of being mixed up in enquiries, if such information is required to be published or produced in a court of law. The fear of reprisals on the part of the criminals sought to be booked is also a valid ground to withhold the contents of such information. In the present case, on a consideration of the entire facts and circumstances, we are satisfied that the disclosure of the contents of the documents in question would really injure and affect public interest and therefore, the privilege claimed by the collector, central excise and customs under s 124, Evidence Act must be upheld.

[48] Reverting to the present appeal, the issue we have to consider is whether the privilege under s 124 of the Evidence Act 1950 is applicable? Applying the law which we have just set out, in considering this pivotal issue, the court would have first to determine whether the communication in question had been made to a public officer in official confidence. If the answer is in the negative, then the s 134 statements will have to be disclosed. If the answer is in the affirmative, then it is for the officer concern to decide whether the statements should be disclosed or not? From the affidavit filed by Mohd Rizal bin Mohamad @ Harun, an investigation officer of the appellant in opposing the respondent's application for discovery, it is revealed that in June 2010, the appellant commenced investigation into suspected offences committed under the securities law in respect of Kenmark. Mohd Rizal was appointed as the investigation officer of the said investigation. Under s 144 of the SCA, Mohd Rizal, while discharging his duties as an officer of the appellant, shall be deemed to be a public servant within the meaning of the Penal Code, and more importantly, a *public officer* for the purpose of the Evidence Act 1950. So, the element of public officer under s 124 of the Evidence Act 1950 has been established. According to Mohd Rizal, as an investigation officer appointed under s 125 of the SCA, he is empowered to carry out investigation of any offence under the securities law which include the CMSA. Under s 134 of the SCA, if an investigation officer carrying out an investigation under securities law, suspects or believes on reasonable grounds that any person can give information relevant to a matter which he is investigating, the investigation officer may require such person to appear before an investigation officer of the appellant to be examined orally in which case the investigation officer shall reduce into writing any statement made by such person. The CMSA also provides the appellant with powers to institute either civil or criminal proceedings or both, against a person suspected to be committing any offence under the securities law. According to Mohd Rizal, the appellant's investigations are crucial to the fulfilment of the appellant's statutory duties to

prevent and investigate breaches of the securities laws by instituting civil or criminal proceedings or both, against persons suspected of violating the securities laws. According to Mohd Rizal, for this purpose all the documents, and particularly the s 134 statements can be utilised by the appellant in civil or criminal proceedings or both. Full discovery of those documents in this case, would gravely prejudice the appellant's conduct of subsequent proceeding against him. Furthermore, the respondent has yet to be examined orally by the appellant pursuant to s 134 of the SCA. The s 134 statements sought by the respondent are actually statements given by 38 other persons interviewed by the appellant in the course of the Kenmark investigations. According to Mohd Rizal, those 38 persons came in and provided the information which was recorded in their statements to the appellant on the basis that the statements were confidential. On the affidavit given, it is clear to us that the s 134 statements of the 38 persons were communication made by each of them to the investigation officer of the appellant in the course of their official duties as public officers under the SCA, and that the communications by the 38 persons were made to them in official confidence. Mohd Rizal deposed that if the s 134 statements were ordered to be disclosed, future witnesses will not give their information to the appellant with the assurance that their statement will be confidential. This, according to him will greatly prejudice the appellant's ability to carry out its future investigations into offences under the securities law, not just into Kenmark, but into any other company. In other words, public interest would suffer by the disclosure of the s 134 statements. As we have decided that the communications were made in official confidence, it is for the officer to determine whether public interests would suffer by the disclosure of the s 134 statements. He had determined that it would. We will not interfere. Thus, the Court of Appeal erred in ordering the disclosure of the s 134 statements pursuant to the respondent's application in encl 38. What we have decided thus far is sufficient to dispose of the present appeal. In the circumstances we find it unnecessary to answer the question of law on which leave to appeal was granted.

[49] In the result, the appeal is allowed with costs. The decision of the courts below in ordering the disclosure of the s 134 statements is set aside.

Appeal allowed and decisions of the courts below in ordering the disclosure of the s 134 statements set aside.

Reported by Ashok Kumar